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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, DEPARTMENT OF PUBLIC SAFETY,
Respondent/Employer-Appellant-Appellee,

vs.

RUTH FORBES (MAB Case No. 354),
Petitioner/Employee-Appellee-Appellant,

and

MERIT APPEALS BOARD,
SEAN SANADA, VALERIE PACHECO, and NORA NOMURA,
Respondents/Agency-Appellees-Appellees.

SCWC-18-0000216

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000216; CASE NO. 1CC171001242)

SEPTEMBER 17, 2025

DISSENTING OPINION BY GINOZA, J.

The majority concludes that under the facts and circumstances of this case, the Merit Appeals Board (**MAB**) did not exceed its statutory authority or abuse its discretion when it modified Respondent/Employer State of Hawai'i, Department of Public Safety's (**DPS**) disciplinary action discharging

Petitioner/Employee Ruth Forbes (**Forbes**). The MAB reinstated Forbes as warden of the Kulani Correctional Facility.

In 2015, DPS discharged Forbes following a Civil Rights Compliance Office (**CRCO**) investigation and pre-disciplinary due process hearing before a hearings officer. The hearings officer sustained thirty-seven out of forty-three charges¹ and recommended to the DPS Director that Forbes be discharged. Following notification of discharge from the DPS Director, Forbes appealed to the MAB. The MAB modified DPS's discharge and reinstated Forbes as warden following a sixty-day suspension pursuant to Hawai'i Revised Statutes (**HRS**) § 76-47(e) (2012).²

¹ The hearings officer's report following Forbes' pre-disciplinary due process hearing sustained thirty-seven charges, partially sustained one, and dismissed five charges. The hearings officer recommended that, "[g]iven the serious nature of the sustained charges, coupled with [Forbes'] egregious behavior and clearly unacceptable pervasive actions over such a substantial amount of time, her continued employment with the [DPS] and the State of Hawaii was not recommended."

In the DPS Director's discharge letter, he stated to Forbes:

You engaged in egregious behavior and clearly unacceptable pervasive actions over a substantial period of time, which were outside of reasonable expectations of any employee, and violated State and Departmental Policies[.] . . . Your conduct created a hostile and at times sexually charged working environment, which coupled with your lack of leadership and mature judgment created serious security, morale, and operational challenges for staff and the good governance of the facility.

² HRS § 76-47(e) provides, in pertinent part:

If the board finds that the reasons for the action are not substantiated in any material respect, the board shall order that the employee be reinstated in the employee's position, without loss of pay, but if the board

DPS appealed to the Circuit Court of the First Circuit (**Circuit Court**),³ pursuant to HRS § 91-14 (2012 & Supp. 2016),⁴ which reversed the MAB. Forbes appealed to the Intermediate Court of Appeals (**ICA**), which affirmed the Circuit Court. See Dep't of Pub. Safety v. Forbes, No. CAAP-18-0000216, 2024 WL 1134050 (Haw. App. Mar. 15, 2024) (SDO). The majority now reverses the ICA and reinstates the MAB's decision.

I respectfully dissent. I agree with the majority to the extent it holds the ICA and the Circuit Court incorrectly relied on DPS's zero-tolerance policy no. ADM.08.10 regarding workplace non-violence. However, under HRS § 91-14(g)(6), DPS correctly argues that the MAB abused its discretion in its Findings of Fact, Conclusions of Law, Decision and Order (**Decision and Order**) given the severe and pervasive behavior by Forbes substantiated by the MAB. I conclude that given the extensive and serious twenty-one charges the MAB substantiated,

finds that the reasons are substantiated or are only partially substantiated, the board shall sustain the action of the appointing authority, provided that the board may modify the action of the appointing authority if it finds the circumstances of the case so require and may thereupon order such disposition of the case as it may deem just. The findings and decisions of the board shall be final on all appeals, unless an appeal is taken as provided in chapter 91.

³ The Honorable Keith K. Hiraoka presided.

⁴ HRS § 91-14 governs judicial review of contested cases.

the MAB should have affirmed DPS's discharge of Forbes. For these reasons, I would affirm the ICA judgment on appeal.

I. STANDARD OF REVIEW

"In this secondary appeal, this court applies the standards of HRS § 91-14(g) to determine whether the circuit court decision was right or wrong." Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 388, 363 P.3d 224, 236 (2015) (citation omitted).

HRS § 91-14(g) provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Emphasis added.)

Regarding the abuse of discretion standard of review:

[T]his court has held that "[a]gency determinations, even if made within the agency's sphere of expertise, are not presumptively valid; however, an agency's discretionary determinations are entitled to deference, and an appellant has a high burden to surmount that deference[.]" *Id.* at 419, 91 P.3d at 501. This court has further described an agency's proper exercise of discretion as "not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed

by the reason and conscience of the judge to a just result." *S. Foods Grp., L.P. v. State, Dep't of Educ.*, 89 Hawai'i 443, 452, 974 P.2d 1033, 1042 (1999) (internal quotations and citations omitted).

Kolio v. Hawaii Pub. Hous. Auth., 135 Hawai'i 267, 271, 349 P.3d 374, 378 (2015) (emphases added).

II. DISCUSSION

In the MAB's Decision and Order, it found "credible evidence" to substantiate twenty-one of the thirty-seven charges against Forbes,⁵ yet modified DPS's discharge to a mere sixty-day suspension. The reasons provided by the MAB are that: "the Board also finds that many of the charges were not substantiated and that there are several reasons why the Board does not believe that discharge was the appropriate discipline[;]" "[Forbes] was tasked with the responsibility for reopening Kulani, which included installation of a new communications system and hiring of employees to fill the various vacant positions at Kulani which would have been complicated for a Warden with experience[;]" "[t]here was no evidence that [Forbes] was previously disciplined while a Warden or in any other position in DPS[;]" and "[Forbes] is a long time employee with the DPS having served for more than twenty years for DPS." The MAB concluded Forbes' actions did not justify DPS's "severe sanction of discharge based on the principle of progressive

⁵ In the Circuit Court, Forbes did not contest the MAB's findings that there was credible evidence to substantiate these charges.

discipline." The MAB also concluded that it did "not believe that [Forbes'] discharge from employment was 'just' or made for such cause that would 'promote the efficiency of government service' under HRS Section 76-46 [(2012)]."⁶

To the contrary, Forbes' severe actions more than justified DPS's severe sanction of discharge, and her discharge was just and promoted the efficiency of government. As warden, she was in the position of authority over the Kulani Correctional Facility, and thus had numerous employees under her supervision, as well as numerous inmates under her charge. The twenty-one charges the MAB substantiated were based on pervasive and egregious conduct including Forbes grabbing an employee's penis; referring to a Black employee as "Planet of the Apes" to other employees; taking an "upskirt" photograph of a female employee's crotch and sharing it with other employees; and making untruthful, evasive, and misleading statements to the CRCO during its investigation.

I conclude the MAB abused its discretion.

⁶ HRS § 76-46, governing discharges and demotions, states: "An appointing authority may discharge or demote any employee when the appointing authority considers that the good of the service will be served thereby. Discharges may be made only for such causes that will promote the efficiency of government service."

A. The MAB's Decision and Order

The MAB has authority to modify the action of the appointing authority - here, DPS - under HRS § 76-47(e), which states, in pertinent part:

if the board finds that the reasons are substantiated or are only partially substantiated, the board shall sustain the action of the appointing authority, provided that the board may modify the action of the appointing authority if it finds the **circumstances of the case so require** and may thereupon order such disposition of the case as it may deem **just**.

HRS § 76-47(e) (emphasis added); see also Hawai'i Administrative Rules § 14-25.1-4(y) (eff. 2003) ("All decisions and orders of the [MAB] shall be made in accordance with personnel laws[.]").

Here, because the MAB partially substantiated the reasons for Forbes' discharge, it could properly modify DPS's action if "the circumstances of the case so require" and order a "disposition of the case as it may deem just." HRS § 76-47(e). I respectfully conclude, however, that the MAB abused its discretion given the circumstances of the substantiated charges and what is just in this case. The MAB's reasoning for vacating the DPS's discharge and imposing only a sixty-day suspension does not reasonably support its decision and is an abuse of discretion.

In finding of fact (**FOF**) 10 of the MAB's Decision and Order, the MAB listed the charges that provided the basis of

Forbes' discharge in the DPS Director's discharge letter. The MAB described the charges it substantiated as follows:

[Forbes'] discharge was based on sexually harassing [Male Employee 1] in **charge 2** and on sexually harassing and creating a hostile and offensive working environment as to [Male Employee 1], [Female Employee 1], [Female Employee 2], [Female Employee 3], [Male Employee 2], and [Female Employee 4] in **charges 3, 4, 5, 6, 7, and 8**. Appellant's discharge was also based on harassing [Female Employee 4], [Male Employee 4], [Female Employee 1], [Male Employee 1], [Female Employee 2], [Male Employee 3], [Male Employee 2], and [Male Employee 5] in **charges 9, 10, 11, 12, 13, 14, 15, . . . 17, . . . 19, and 20**. . . . Lastly, [Forbes'] discharge was further based on . . . yelling and swearing at [Male Employee 1], etc. in **charge 33**, . . . for yelling and swearing at [Male Employee 1] in **charge 37**, for making untruthful, evasive misleading and irrelevant statements etc. in **charge 38**, . . . for publicly exhibiting disrespect for at least ten Kulani employees in **charge 41**[.]

(Emphases added.) The MAB concluded that, based on its findings, Forbes engaged in the conduct as alleged in the above charges. However, notwithstanding a two-day contested case hearing, the MAB failed to provide any further information about the type of severe conduct involved.

The MAB's conclusions of law (COL) state, in relevant part:

29. Therefore, the Board finds based on the Findings of Fact, the allegations in charges 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 33, 37, 38, and 41 are substantiated as the term is used in HRS Section 76-47(e).

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31. While [DPS] has argued that the misconduct of [Forbes] is more than adequate to support the decision to terminate Forbes' employment, the Board does not believe that [Forbes's] discharge from employment was "just" or made for such cause that would "promote the efficiency of government service" under HRS Section 76-46. While the Board finds that there are substantiated reasons to discipline [Forbes], the Board also finds that many of the charges were not substantiated and that there are several reasons

why the Board does not believe that discharge was the appropriate discipline.

32. Here, [Forbes] was tasked with the responsibility for reopening Kulani [Correctional Facility], which included installation of a new communications system and hiring of employees to fill the various vacant positions at Kulani which would have been complicated for a Warden with experience. There was no evidence that [Forbes] was previously disciplined while a Warden or in any other position in DPS. [Forbes] is a long time employee with the DPS having served for more than twenty years for DPS. [Forbes'] actions herein do not justify the imposition of the severe sanction of discharge based on the principle of progressive discipline. Thus, the Board does not find that the discharge of Appellant was just under the circumstances and will not promote the efficiency of government service.

(Emphases added.)

The MAB thus determined "the action taken by the Respondent DPS to discharge [Forbes] was not just or to promote the efficiency of government," and instead imposed reinstatement without loss of pay reduced and/or offset by any Unemployment Insurance, etc., and the restoration of all rights and benefits of the warden position following a sixty-day suspension.

B. The MAB abused its discretion given the substantiated charges against Forbes.

The MAB's scant description in FOF 10 of Forbes' conduct underlying the substantiated charges does not adequately portray Forbes' severe and pervasive misconduct. The CRCO's Report of Investigation, which was the basis for the charges against Forbes, provides a far more detailed account, as discussed in part below.

The MAB concluded there was credible evidence that Forbes sexually harassed Male Employee 1 through unwanted

physical contact and substantiated Charge 2. Regarding the conduct underlying Charge 2, the CRCO found that:

FORBES touched [Male Employee 1's] penis through his pants while riding next to each other in the front seat of [a Kulani Correctional Facility vendor's] pick-up truck. . . . [Male Employee 1] found the touching to be sexually suggestive and offensive, especially given FORBES' simultaneous comments regarding 'love' and 'reciprocation.'

[Male Employee 1] clearly recalls the incident. While riding in [vendor's] truck on the way to Kaleo's, FORBES was dancing in her seat between [vendor] and [Male Employee 1]. FORBES was intoxicated from drinking [vendor] was driving with FORBES seated between him and [Male Employee 1] to her right. [Male Employee 1] says FORBES squeezed his penis through his pants. He jumped and told her to stop and FORBES said, "You show me no love and no reciprocation. Forget you." . . .

[Female Employee 2] and [Female Employee 1] report seeing FORBES lean toward [Male Employee 1] and reach downward with her left arm, then seeing [Male Employee 1] jump and pull away from FORBES and hearing him exclaim "YIKES!" over the sound of music playing (they could not see FORBES' hand due to their position in the backseat). They also report hearing FORBES complain out loud and utter the words, "You don't reciprocate[.]"

. . . .

FORBES' conduct was not welcome by [Male Employee 1].

The MAB also substantiated Charges 3 through 8, concluding there was credible evidence that Forbes sexually harassed Male Employee 1, Male Employee 2, Female Employee 1, Female Employee 2, Female Employee 3, and Female Employee 4 and created a hostile work environment.

The CRCO's findings as to Charge 3 are as follows:

In addition to the severe, unwelcome touching detailed above, FORBES engaged in further unwelcome, sexually related conduct around [Male Employee 1].

FORBES told [Male Employee 1] about sexually graphic texts she had received while at work. FORBES showed [Male

Employee 1] an "up-skirt" photo of [Female Employee 3]. . .
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[Male Employee 1] says the picture showed a woman's "chubby" inner thighs and underwear. [Male Employee 1] says FORBES told him that she had pretended to be sending a text and took the picture surreptitiously.

[Male Employee 1] recalls FORBES making disparaging comments about the woman in the picture[.]

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[Male Employee 1] recalls FORBES telling him about "sexts" she had received while at work from her lover on Oahu. [Male Employee 1] says FORBES related sexts to him[.]

[Male Employee 3] has seen FORBES harass [Male Employee 1] by rubbing his close-shorn head while saying he is a Shar Pei (breed of dog), and by rubbing his belly while saying [Male Employee 1's] shirt is too tight. [Male Employee 3] has seen [Male Employee 1] pull away from FORBES and push her hand away when she does this.

[Female Employee 4] has heard FORBES yell at [Male Employee 1] and call him "fat" and a "Shar Pei."

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FORBES admits to:

1. Calling [Male Employee 1] a Shar Pei.
2. Having possessed the photo of [Female Employee 3].
3. Showing the photo of [Female Employee 3] to at least one subordinate, [Female Employee 1].
4. Telling subordinates about her extramarital affair with a man on Oahu.
5. Showing subordinates "sexts" from her lover.

Forbes also told Male Employee 1, Female Employee 1, and Female Employee 2 details about her sex life and that Forbes should just have sex with Male Employee 2 because "pussy would control him."

As to Charge 4, the CRCO found:

FORBES harassed [Female Employee 1] by: touching [Male Employee 1's] penis in her presence and saying "no reciprocation"; making sexual references and showing [Female Employee 1] sexually graphic and themed texts and photos while at work, including an "up-skirt" photo of [Female Employee 3] and a photo of the penis of the man with whom FORBES was conducting an extramarital affair; spreading rumors about [Female Employee 3's] sexual history, physical appearance and vagina; relating a rumor about [Female Employee 2's] (juvenile) sexual history to [Female Employee 1]; dancing and pulling down her blouse to expose her bra to [Female Employee 1] and [Female Employee 2] at FORBES' home; displaying to and sending [Female Employee 1] an inappropriate text which included a sexual pun on the name "Tupac"; interfering with [Female Employee 1's] work and training by constantly talking about sexual topics such as her sex life with her husband and her sex life with her lover on Oahu rather than work-related topics; and by making numerous sexually graphic statements[.]

The CRCO also found that Female Employee 1 stated Forbes would make derogatory sexual comments about Female Employee 3 and showed Female Employee 1 the same "upskirt" photo of Female Employee 3, where Forbes took a photo of Female Employee 3, zoomed in on her crotch, then took a screenshot and shared it with "everyone."

The CRCO's findings as to Charge 5 include the following:

FORBES harassed [Female Employee 2] by: spreading rumors about [Female Employee 2's] sexual history to another employee; pressuring [Female Employee 2] to date or have sex with a [Kulani Correctional Facility] volunteer; touching [Male Employee 1's] penis in her presence and saying the words 'no love or reciprocation'; making sexual references and showing [Female Employee 2] sexually-graphic and themed texts and photos while at work, including an 'up-skirt' photo of [Female Employee 3] and a photo of the penis of the man with whom FORBES was conducting an extramarital affair; spreading rumors about [Female Employee 3's] sexual history, physical appearance and vagina; dancing and pulling down her blouse to expose her bra and cleavage to [Female Employee 2] and [Female Employee 1] at FORBES' home; and directing [Female Employee

2] to record and send a video to two men of FORBES dancing and pulling down her blouse to expose her bra.

The CRCO's findings as to Charge 6 include the following:

FORBES created a hostile and offensive working environment for [Female Employee 3] on the basis of sex. FORBES produced and displayed to subordinates an "up-skirt" photo of [Female Employee 3]. While FORBES (incredibly) denies having produced the photo, she does admit showing it to at least one subordinate, [Female Employee 1].

[Female Employee 2] recalls FORBES showing her and [Male Employee 1] a photograph on her "warden's phone" that she said she had taken of [Female Employee 3] while at a meeting on Oahu in or about July, 2014. The photo was taken from under a table, and showed [Female Employee 3's] skirt, legs and panties.

The CRCO's findings as to Charge 7 include the following:

FORBES directly harassed [Male Employee 2] by: calling him drunk late at night to tell him she loved him and invite him to come to her house and drink alcohol with her; texting him inappropriately; making derogatory comments relating to [Male Employee 2's] perceived (by FORBES) physical and intellectual resemblance to two fictional characters, Homer Simpson and Uncle Fester; and by engaging in other unwelcome conduct.

[Male Employee 1] says FORBES referred to [Male Employee 2] as "Uncle Fester" (a bald, middle-aged, simple-minded, White male television and movie character) and called him "Homey" to his face. FORBES showed [Male Employee 1] a picture of (the nearly-bald, middle-aged, simple-minded, White male cartoon character) Homer Simpson and told [Male Employee 1] that (the bald, male, "Caucasian" per [Male Employee 1]) [Male Employee 2] looked like him.

The CRCO found that Male Employee 2 was aware of the sexual remarks she made about him to Female Employee 1, Female Employee 2, and Male Employee 1, and "became very disturbed and uncomfortable" to the point where he did not want to be in the same room with Forbes.

The CRCO's findings as to Charge 8 include the following:

FORBES created a hostile and offensive working environment for [Female Employee 4] on the basis of sex by pressuring [Female Employee 4] to go out on dates and spend a weekend away with [a Kulani Correctional Facility vendor]; by revealing personal information about [Female Employee 4] to [vendor] that might help him woo [Female Employee 4] (her birthday and relationship status); by making repeated derogatory remarks about [Female Employee 4's] physically appearance including 'Neapolitan' (for [Female Employee 4's] eye shadow, which was pink, white and brown like the ice cream), 'Hello Kitty,' (an animated Japanese feline) and 'Kerokeropi' (an animated Japanese frog) and 'Japanese ghost'; and by failing to protect [Female Employee 4] from [vendor's] inappropriate sexual advances, such as [vendor's] offering to reimburse [Female Employee 4] for lost wages 'plus extra' if she went with him to Waikoloa.

The CRCO also found Forbes made personal criticisms about Female Employee 4 in the presence of Male Employee 1, Female Employee 1, and Female Employee 2, saying Female Employee 4 was, "congenitally mentally ill, a hoarder, a trouble maker, and 'pilau' (dirty)."

In addition, the MAB substantiated Charge 10, where the MAB found Forbes created a hostile and offensive working environment for Male Employee 4, a Black employee, on the basis of race. The CRCO's findings include that multiple witnesses reported that Forbes referred to this employee as "Monkey," "Monkey boy," "Black monkey boy," "Planet of the Apes," and "That black bastard."

The MAB also substantiated Charges 11 through 15 based on the above derogatory comments about Male Employee 4, varieties of which Forbes made in the presence of Female

Employee 1 (Charge 11), Male Employee 1 (Charge 12), Female Employee 2 (Charge 13), Male Employee 3 (Charge 14), and Male Employee 2 (Charge 15), which constituted harassment as a third party on the basis of race by creating a hostile and offensive working environment.

In addition to the above, the MAB substantiated Charge 38, "for making untruthful, evasive[,] misleading and irrelevant statements etc." More specifically, these untruthful, evasive, misleading and irrelevant statements were made to the CRCO during the departmental investigation.

The above summarizes just fourteen of the twenty-one charges substantiated by the MAB. Despite the deference given to agency determinations, the MAB's findings and conclusions wholly fail to provide a non-arbitrary basis for how it determined such a drastic modification of Forbes' discharge was warranted given her severe and pervasive misconduct on the charges that were substantiated. See, e.g., Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to Interim Instream Flow Standards, 154 Hawai'i 309, 354-55, 550 P.3d 1167, 1212-13 (2024) (stating that despite hundreds of FOFs and COLs in the Commission on Water Resource Management's Findings of Fact, Conclusions of Law, and Decision and Order, "where the record demonstrates considerable conflict or uncertainty in the evidence, the agency must articulate its

factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected[,]” and “[w]e cannot speculate regarding possible justifiable bases for the Commission's decision, for a ‘reviewing court must judge the propriety of agency action solely by the grounds invoked by the agency, and that basis must be set forth with such clarity as to be understandable’” (citations omitted)); Matter of Hawai‘i Elec. Light Co., 145 Hawai‘i 1, 11, 445 P.3d 673, 683 (2019) (stating “any presumption of validity given to an agency’s decisions presupposes that the agency has grounded its decision in reasonably clear findings of fact and conclusions of law” (citation and internal quotation marks omitted)); Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kauai, 133 Hawai‘i 141, 164, 324 P.3d 951, 974 (2014) (stating “[a] court reviewing the decision of an agency should ensure that the agency . . . make its findings reasonably clear. The parties and the court should not be left to guess . . . the precise finding of the agency[,]” and “[a]n agency's findings should be sufficient to allow the reviewing court to track the steps by which the agency reached its decision” (citations and internal quotation marks omitted)); Dep't of Pub. Safety v. Naumu, No. CAAP-16-0000739, 2022 WL 484970, *10 (Haw. App. May 10, 2022) (mem. op.) (determining the circuit court was not wrong in concluding the MAB’s findings

were insufficient to allow the circuit court to determine how the MAB made its decision (citation omitted)).

In my view, the MAB failed to provide adequate findings to explain how or why the serious misconduct by Forbes warranted only a sixty-day suspension. The MAB did not address in any way the facts and the severity of substantiated charges. Even with the deference to which it is entitled, the MAB's articulated reasons fall far short of showing that the circumstances of the case required modification of DPS's decision to discharge Forbes and that the MAB's decision was just. First, the MAB's rationale that it did not substantiate all thirty-seven charges does not support Forbes's reinstatement. The relevant fact is that twenty-one charges were sustained by the MAB against Forbes. What is material is the substantiated charges and Forbes' underlying conduct, which was egregious.

Second, the MAB reasoned that Forbes was "tasked with the responsibility for reopening Kulani [Correctional Facility], . . . which would have been complicated for a Warden with experience." But it is unclear how the difficulty of Forbes' position mitigates against, for instance, grabbing the genitals of a subordinate employee or the numerous instances of harassment and sexual harassment of other employees. So much of Forbes' conduct for the substantiated charges goes far beyond

the pale, and the fact that she was the warden and tasked with reopening the Kulani Correctional Facility makes her conduct even more serious and damaging. Her discharge clearly would promote the efficiency of government service. HRS § 76-46.

Third, the MAB justified its decision by explaining Forbes had "served for more than twenty years for DPS" as a "long time employee," and "[t]here was no evidence that [Forbes] was previously disciplined[.]" The MAB concluded the principle of progressive discipline did not justify Forbes' discharge. Seventeen of the substantiated charges were in violation of Policy no. ADM.03.13 Discrimination and Harassment in Employment. A description of the policy in the record provides:

Discrimination and harassment of employees and volunteers of the [DPS] are prohibited and shall not be tolerated or condoned by the Department. Employees or volunteers of the Department engaged in such activity of discrimination or harassment may be subject to corrective action up to and including immediate discharge.

(Emphasis added.)

Other courts reviewing the issue of progressive discipline have stated that progressive discipline can and should be bypassed for severe misconduct. See, e.g., Matter of Ambroise, 318 A.3d 75, 86 (N.J. 2024) (holding civil service commission's decision to reject removal of correctional officer and impose six-month suspension was arbitrary, capricious and unreasonable, and stating progressive discipline: "is not a fixed and immutable rule to be followed without question because

some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record[;]" "may be bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property[;]" and "is not a necessary consideration . . . when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest" (citations and internal quotation marks omitted)); In re Jewett, 978 A.2d 470, 480 (Vt. 2009) (reversing Labor Relations Board's decision because "grievant's conduct was significant enough to warrant bypassing progressive discipline" and State's decision to dismiss grievant was reasonable as a matter of law); Grievance of Graves, 520 A.2d 999, 1002 (Vt. 1986) (bypassing progressive discipline and immediately dismissing employee was "certainly justified by a pattern of fraud").

Here, the discrimination and harassment policy provides that corrective action can include immediate discharge. Based on the charges that were substantiated by the MAB, Forbes created a hostile and offensive working environment by discriminating against, sexually harassing, and harassing multiple employees under her supervision. This included the

highly improper physical conduct of grabbing the penis of someone she supervised. Progressive discipline should not protect any employee from the severe misconduct that was substantiated in this case.

III. CONCLUSION

For these reasons, I respectfully dissent and would affirm the ICA judgment on appeal, which affirmed the Circuit Court's judgment in favor of DPS.

/s/ Lisa M. Ginoza

